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Trump Administration Makes Another Move to Undermine ACA Marketplace Protections

A waiver is a request by a state to waive certain federal health care program minimum requirements. Waivers of Medicaid requirements (known as Section 1115 waivers) have become fairly well-known over the past year, largely due to the Trump Administration's interest in how states can use such a legal device to promote [work requirements](#) in safety net programs. Now, the Administration is looking to exploit another waiver—commonly referred to as the Section 1332 Waiver and the State Innovation Waiver (newly rebranded as the State Relief and [Empowerment](#) Waiver)—which targets ACA Marketplace health insurance plans. Seemingly without regard for principles of [separation of powers](#) or even President Trump's transition [promise](#) to eliminate two regulations for each one enacted, the Administration has been busy finding end runs around dismantling the ACA in the wake of repeated Congressional failures to repeal and replace it. This is today's attempted play.

On October 24, the Department of Health and Human Services (HHS) and the Department of the Treasury issued [guidance](#) allowing expanded flexibility for states to use Section 1332 waiver authority to waive an array of private insurance provisions. **Importantly, the guidance will not have any direct impact on the insurance market for 2019; rather, federal approvals could occur in 2019 that would affect policies and practices in the 2020 plan year.** Nevertheless, federal agencies are accepting comments on the new guidance, and we can expect that some states will be developing proposals and, if necessary, authorizing legislation in the coming months.

Background Facts on Section 1332 Waivers

Section 1332 of the Affordable Care Act (ACA) allows the federal government to approve state proposals to waive specific provisions of the Act. Only [certain private insurance provisions](#) relating to [qualified health plans](#) and marketplaces, [premium tax credits and cost-sharing reductions](#) for marketplace plans, and the employer and individual [mandates](#) can be waived. Notably, states cannot waive the ACA's nondiscrimination protections, the ban of annual or lifetime coverage limits, or the guaranteed issue and community rating requirements (i.e., the protections for people with pre-existing conditions). These critical protections are not subject to Section 1332 no matter what the Trump Administration does.

Federal approval of a waiver proposal is also subject to certain parameters set forth in the law. More specifically, a proposal must demonstrate that the state plan will provide coverage that is **at least as comprehensive and affordable as would have existed without the waiver**, that at least a comparable number of people will receive coverage, and that the waiver will not increase the federal deficit. We refer to these criteria collectively as "Statutory Criteria." HHS issued [regulations](#) in

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2012, supported by [2015 guidance](#), interpreting the Statutory Criteria and outlining how a state can demonstrate that its waiver proposal satisfies these standards. It is this language in the law that the Trump Administration is now creatively re-interpreting to achieve its preferred ideological ends.

What's New?

The new guidance replaces the 2015 guidance and reinterprets the Statutory Criteria. Two especially concerning differences between the 2015 and 2018 guidance involve consideration of (1) the impact on vulnerable populations, and (2) the meaning of “minimum essential coverage.”

Vulnerable Populations. In applying the coverage-related Statutory Criteria (i.e., the standards requiring comparability in comprehensiveness, affordability, and the number of people covered), the 2015 guidance required the state to consider impacts on both the state population as a whole and on different subgroups of vulnerable residents. In particular, states had to consider the impact of a proposed waiver on low-income residents, chronically ill residents, and elderly residents. Even if a state could demonstrate that a waiver satisfied the Statutory Criteria for the state population as a whole, the waiver could not be approved if it reduced coverage for any of these subgroups. Under the new Trump Administration Guidance, HHS would only consider the impact on the state population as a whole (the aggregate impact).

Minimum Essential Coverage. The 2015 guidance interpreted the statutory word “coverage,” as referring to “minimum essential coverage,” or coverage that the ACA deems compliant in satisfying the insurance mandates. In other words, a comparable number of state residents must be forecast to have minimum essential coverage under the waiver as would have minimum essential coverage absent the waiver. A waiver proposal that would reduce coverage below this type of comparability standard would fail the test and could not be approved because people were directed into [junk insurance](#) plans would not qualify as having minimum essential coverage. Now, HHS will only consider whether comprehensive and affordable health plans are *available for purchase* to a comparable number of residents. What protection does this guardrail offer in practice? In the words of journalist [Olga Khazan](#), it’s “like a bespoke thing that everyone, in theory, has the right to buy.” Or, to quote [Senator Bernie Sanders](#), “it doesn’t mean a damn thing.” It will be interesting to see how states demonstrate compliance with this standard in their waiver proposals.

A comprehensive review of the changes introduced by the new guidance is available [here](#).

Is the Administration Overstepping its Authority?

Federal agencies like HHS are not permitted to change the Statutory Criteria; only Congress can change these standards by amending the ACA. Therefore, an interpretation by HHS that is counter to or exceeds a reasonable interpretation of the Statutory Criteria is a violation of the Agency’s authority.

Members of Congress clearly thought that the Statutory Criteria require states to ensure coverage that is at least as comprehensive as provided for under the ACA when they sought to lower the bar by amending the Statutory Criteria as part of repeal and replace efforts in Congress during 2017. The original [Better Care Reconciliation Act of 2017](#), for example, would have modified the standard to require that states simply describe its “alternative means of, and requirements for, increasing access to comprehensive coverage, reducing average premiums, and increasing enrollment.” This suggests that

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the new guidance conflicts with the ACA, and is effectively amending the law in a manner that Congress itself could not achieve. Arguments will no doubt be forthcoming that this constitutes an impermissible Agency overreach.

The ACA also requires states to pass specific authorizing legislation in order to apply for and, ultimately, implement waiver-based initiatives. However, the new guidance suggests that a less deliberative and democratic process may be sufficient. Existing state law, such as legislation generally granting authority to an official or agency to implement and enforce the ACA, when combined with an executive order or regulation directing the official/agency to pursue a waiver, may now satisfy the requirement. HHS is therefore bypassing and undermining protections put in place by the law itself. Undoubtedly, another example where charges of impermissible Agency overreach are on their way.

The GOP's reliance on administrative action to accomplish what Congress did not—could not—must have limits. While the new guidance will not have any direct impact on the insurance market for 2019, the guidance encourages states to submit proposals during the first few months of 2019 to ensure approval for 2020. In some states seeking to take advantage of the increased flexibility, we may see bills that would provide the requisite authorizing legislation. In other states, no changes may occur. In any event, states are required to hold a public notice and comment period prior to submitting a waiver application. These are valuable opportunities to challenge harmful reforms. CHLPI staff will be tracking developments and contributing comments, and are available to support you in your advocacy efforts.

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